No. 17-269

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF WASHINGTON STATE ASSOCIATION OF COUNTIES AND ASSOCIATION OF WASHINGTON CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Washington State Association of Counties ("WSAC") and The Association of Washington Cities ("AWC") seek leave to file an amici curiae brief in support of the petitioner in this case. *See* Sup. Ct. R. 37.2(b). Petitioner filed a blanket consent. The letter is on file with the Clerk's Office. Respondents have not consented.

I.

The undersigned are organizations with significant interests in the issues presented by this case. The Washington State Association of Counties is a non-profit, non-partisan organization that represents Washington's counties before the state legislature, the state executive branch, and regulatory agencies. Although membership is voluntary, WSAC consistently maintains 100 percent participation from Washington's 39 counties, 14 of which are located within the Case Area that is the subject of this litigation ("Case Area Counties").

The Association of Washington Cities is a private non-profit corporation that represents Washington's cities and towns before the state legislature, the state executive branch, and regulatory agencies. Membership is voluntary, but the association includes all of Washington's 281 cities and towns. There are 131 cities and towns in the Case Area Counties with an approximate total population of 3.4 million residents.

Like the State of Washington, Case Area political subdivisions were not signatories to the Treaties, but they are responsible for the maintenance and construction of roads and culverts, of which there are thousands within the Case Area. WSAC and AWC have concerns that the Tribes may seek to extend the lower court's interpretation of their treaty rights to culverts of other political subdivisions, as well as numerous other activities that potentially impact salmon supply.

WSAC and AWC wish to assist the Court's review in this case by discussing the implications of the Ninth Circuit's beyond the parties, including the unlikelihood of the Eleventh Amendment operating as a sufficient check against the breadth of the Ninth Circuit's decision and accompanying equitable relief.

II.

Supreme Court Rule 37 permits filing of amicus curiae briefs. The rule requires that potential amici provide notice to, and obtain written consent from, the parties before the amicus brief is due. *Id.* If the parties do not consent, the rule permits potential amici to seek leave to file from the Court itself. Sup. Ct. R. 37.2(b).

Counsel for amici reached out to counsel for Respondents on March 2, 2018 requesting authorization for the filing of this amicus brief. Counsel did not receive a response from the Solicitor General's Office. On March 4, 2018, undersigned counsel received a response from John Sledd, lead counsel for the Tribes,

reporting that he would not be able to obtain consent from all Tribes involved by amici's filing deadline.

Because counsel have been unable to secure consent from the respondents, amici request that this Court permit it to file a brief in support of the petitioner.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

The Washington State Association of Counties ("WSAC") is a non-profit, non-partisan organization that represents Washington's counties before the state legislature, the state executive branch, and regulatory agencies. Although membership is voluntary, WSAC consistently maintains 100 percent participation from Washington's 39 counties, 14 of which are located within the Case Area that is the subject of this litigation.[2]

The Association of Washington Cities is a private non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch, and regulatory agencies. Membership is voluntary, but the association includes all of Washington's 281 cities and towns. There are 131 cities and towns in the Case Area Counties with an approximate total population of 3.4 million residents, or nearly half of Washington's entire population.[3]

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[1] A Motion for Leave to File accompanies this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Washington Counties located within the Case Area are Clallam, King, Kitsap, Grays Harbor, Island, Jefferson, Lewis (partially), Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

[3] Washington Cities located within the Case Area are Aberdeen, Algona, Anacortes, Arlington, Auburn, Bainbridge Island, Beaux Arts Village, Bellevue, Bellingham, Black Diamond, Blaine,

Like the State, Case Area political subdivisions were not signatories to the Treaties. But they are responsible for the maintenance and construction of roads and culverts, of which there are thousands within the Case Area. WSAC and AWC have concerns that the lower court's interpretation of the treaty rights may be extended to culverts of other political subdivisions, as well as numerous related activities that potentially impact salmon supply.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, it is the State of Washington that must dig deep to find $1.88 billion to fund culvert replacement.

Bonney Lake, Bothell, Bremerton, Brier, Buckley, Bucoda, Burien, Burlington, Carbonado, Carnation, Centralia, Chehalis, Clyde Hill, Concrete, Cosmopolis, Coupeville, Covington, Darrington, Des Moines, DuPont, Duvall, Eatonville, Edgewood, Edmonds, Elma, Enumclaw, Everett, Everson, Federal Way, Ferndale, Fife, Fircrest, Forks, Friday Harbor, Gig Harbor, Gold Bar, Granite Falls, Hamilton, Hoquiam, Hunts Point, Index, Issaquah, Kenmore, Kent, Kirkland, La Conner, Lacey, Lake Forest Park, Lake Stevens, Lakewood, Langley, Lyman, Lynden, Lynnwood, Maple Valley, Marysville, McCleary, Medina, Mercer Island, Mill Creek, Milton, Monroe, Montesano, Morton, Mossyrock, Mount Vernon, Mountlake Terrace, Mukilteo, Napavine, Newcastle, Nooksack, Normandy Park, North Bend, Oak Harbor, Oakville, Ocean Shores, Olympia, Orting, Pacific, Pe Ell, Port Angeles, Port Orchard, Port Townsend, Poulsbo, Puyallup, Rainier, Redmond, Renton, Roy, Ruston, Sammamish, SeaTac, Seattle, Sedro-Woolley, Sequim, Shelton, Shoreline, Skykomish, Snohomish, Snoqualmie, South Prairie, Stanwood, Steilacoom, Sultan, Sumas, Sumner, Tacoma, Tenino, Toledo, Tukwila, Tumwater, University Place, Vader, Westport, Wilkeson, Winlock, Woodinville, Woodway, Yarrow Point, and Yelm.

Absent reversal, tomorrow it will likely be the counties, cities, and even private citizens of Washington who will have to fund the removal and replacement of thousands of culverts, regardless of the cost-benefit ratio for salmon run enhancement. That is the natural import of a decision that could be interpreted to confer upon the Tribes a seemingly limitless veto power over any and all activities that impact the salmon supply in the Case Area.

The range of potentially offending conduct is considerable: everything from dams and docks to levees and roads along streams and rivers, to treated wastewater discharge and private developments. Each of these projects is of considerable benefit to *all* Washingtonians, including the Tribes. They provide for flood control, irrigation for agriculture, hydroelectric power, jobs, mobility, and housing. But by prioritizing salmon supply over all other benefits, the Ninth Circuit opinion does not provide clear guidance and could be read to afford the Tribes the unilateral right to regulate each of these activities, and more.

The panel comforted itself that its opinion had "not opened the floodgates to ... [such] future suits" because the Eleventh Amendment would act as a bulwark. Pet. App. 11a. "The only possible plaintiff," the panel claimed, "is the United States." But irrespective of whether that operates as an effective safeguard for the State of Washington, it is of no comfort to the counties and cities within it because they enjoy no Eleventh Amendment immunity. Accordingly, if left untouched, the Ninth Circuit opinion threatens considerable—potentially insurmountable—expense and uncertainty upon the political subdivision amici.

ARGUMENT

What the treaties at issue promised the Tribes is the "[t]he right of taking fish ... *in common with all citizens*[.]" That, this Court has explained, means a right to "a fair share of the available fish"—not a "right to as many fish as their commercial and subsistence needs dictate[]." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662, 670, 685 (1979) (emphasis added). But that's exactly what the Ninth Circuit's decision granted them. Without clear guidance from the Court, the import of that textually and historically unmoored interpretation is considerable, if not devastating, to the counties and cities in the Case Area.

I. Case Area Political Subdivisions Are Gravely Threatened By The Ninth Circuit's Decision

A. Counties and cities are ill-equipped to assume the cost of replacing their outsized share of culverts

The State of Washington is not alone in its responsibility for culverts in the Case Area. While "10% of barrier culverts involve state roads, 40% [involve] county/municipal roads." J.A. 439a. Indeed, according to recent data compiled by the Washington Department of Fish and Wildlife, there may be as many as 2,037 county-owned barrier culverts within the Case Area. CA9 ER 407-555 (Tribal Trial Ex.

#158).[4] Or, as a July 2012 Washington State Department of Fish and Wildlife Study reports, for every Washington State Department of Transportation ("WSDOT") barrier, "[o]n average, there are two other [non-WSDOT] barriers downstream and five upstream." Pet. App. 203a. Given the disproportionate number of non-State culverts, the county and city amici face a proportionally greater financial threat from the Ninth Circuit decision.

Having concluded that the ownership and maintenance of culverts that block passage of anadromous fish (*e.g.*, salmon) violates the Stevens Treaties, the lower courts imposed a 17-year timeline on WSDOT to replace no less than 800 barrier culverts with "stream simulation"[5] design culverts or bridges. Pet. App. 107a. State projections put compliance at over $2 billion by 2030, or approximately $120 million per year. *See* Pet. Br. 55 (citing Washington State Dep't of Transp., *Restoring Fish Passage at WSDOT Stream Crossings* (Sept. 14, 2017)).[6]

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[4] CA9 ER refers to the excerpts of record submitted to the Ninth Circuit Court of Appeals. This same table also shows that most of these have significant (>200m) upstream habitat, but for a large number of these culverts, the upstream habitat has yet to be measured.

[5] Stream simulation design frequently comes in the shape of a concrete structure, at least as wide as bank-full width plus a buffer. CA9 ER 000015 (Decision, ¶3.38); CA9 ER 000689 (picture of stream simulation design).

[6] *Available at* http://tinyurl.com/yc8n6r47.

Extrapolating state costs to just the counties reveals staggering sums. The average cost of correcting recent culverts was $2.3 million per project. CA9 ER 1068 (Wagner, 20:3-24); Washington State Dep't of Transp., *WSDOT Fish Passage Performance Report*, Table 2 (June 30, 2017).[7] These corrections become even more expensive as WSDOT progresses deeper into its list of barrier culverts and confronts more complex and costly projects. CA9 ER 1068 (Wagner, 20:3-24). Consequently, in 2017, the cost per project increased, on average, to $3.4 million. Pet. Br. 21.

Using just the $2.3 million average puts the cost at nearly $4.68 billion to correct 2,037 known county-owned barrier culverts. Shouldering this financial burden would be crippling. If Case Area counties were ordered to correct all their barriers on the same schedule as the State—i.e., within 17 years—they would have to find an additional $275 million ($4.68 billion/17) per year to meet such a deadline.[8] Compare that figure to the 2013 Public Works Construction Fund for Pierce County, one of the largest counties by population in the Case Area—approximately $28 million.[9] Or the total budget for all of Mason County, a more rural county within the Case Area—

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[7] *Available at* http://tinyurl.com/yby6aexd.

[8] For the purposes of understanding the potential impacts of this decision on counties, WSAC respectfully requests that the court take judicial notice of the budget documents cited below.

[9] *See* Pierce County, *Pierce County 2014 Budget: Public Works and Utilities* 406, http://tinyurl.com/yadthvkv (last visited Mar. 5, 2018).

approximately $85 million.[10] It's no exaggeration to say that if such a staggering judgment were issued, depending on county budget and culvert numbers, some would face the prospect of bankruptcy.

That threat is all the more real given the limited ability Washington counties have to raise new funds for culvert correction. Funding for existing county road improvement projects can include a mix of property tax revenue, the county allocation of revenue from the state Motor Vehicle Fuel Tax or "gas tax," traffic impact fees paid by developers, and state and federal grants.[11] But the revenue a county receives from the gas tax and state and federal grants is largely outside the control of the county. Both the Washington Constitution and various statutes limit the rate of growth with respect to authorized taxes.[12] And in the absence of express authorization from the State Legislature, counties cannot impose a new tax to pay for culvert corrections.[13]

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[10] *See* Mason County, *Mason County Resolution No. 92-12, Adoption of 2013 Budget* (Dec. 30, 2012), http://tinyurl.com/y7s7vh6n.

[11] *See e.g.*, Pierce County Dep't of Public Works and Utilities, *Six-Year Transportation Improvement Program (2013-2018)* N-2 to N-6, http://tinyurl.com/ybtfmktp (last visited Mar. 5, 2018).

[12] *See, e.g.*, Wash. Const., art. 7, § 2 (limitation on property tax levies); Wash. Rev. Code § 84.52.043 (limitation on property tax levies); Chapter 82.14 Wash. Rev. Code (local retail sales and use taxes); *see also* Municipal Research and Services Center, *A Revenue Guide for Washington Counties* (Aug. 2017), http://tinyurl.com/ycw9vrnh.

[13] *Hillis Homes, Inc. v. Snohomish Cty.*, 650 P.2d 193, 195 (Wash. 1982).

At a minimum, absent new funding sources, counties would likely be forced to divert money from their general funds—monies that go to courts, jails, sheriff departments, health, parks, animal control, and growth management and land use planning—to pay for culvert correction.[14] And, as it is, many counties are already struggling to fund even these most basic services.[15] Layering the mandated replacement of culverts on top of these core responsibilities would be devastating.

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[14] *See, e.g.*, Wash. Rev. Code § 2.32.210 (court reporter compensation); Wash. Rev. Code § 3.34.020 (district court judges); Wash. Rev. Code § 3.54.010 (district court clerks); Wash. Rev. Code § 3.58.050 (district court facilities); Wash. Rev. Code § 13.04.040 (juvenile probation counselors and administrators); Wash. Rev. Code § 15.09.131 (horticultural and pest eradication); Wash. Rev. Code § 26.12.220 (family court services); Wash. Rev. Code § 36.32.120 (building code compliance, business licensing, county jails and courthouses, fund all county offices, including the sheriff and the prosecuting attorney); Wash. Rev. Code § 36.70A.130 (growth management); Wash. Rev. Code § 68.50.010 and Wash. Rev. Code § 68.50.160 (disposal of unclaimed human remains); Wash. Rev. Code § 68.52.010 (morgue); Wash. Rev. Code § 70.12.025 (public health). *See also* Whatcom County, ***2013-2014 Final Budget, Volume I*** 48-51 (2013), http://tinyurl.com/yc4799jr.

[15] *See, e.g.*, Lewis County Board of County Commissioners, ***2012 Annual Budget*** 43, 105, 111, http://tinyurl.com/ycc5lx23 (last visited Mar. 5, 2018) (revenues falling short of expenditures, significant personnel losses in the prosecuting attorney's office and sheriff's departments).

B. Given the breadth of the Ninth Circuit opinion, counties and cities are equally threatened by non-culvert projects that impact salmon supply

What's more, this only accounts for the cost of culverts removal and replacement. The Ninth Circuit opinion imposes no limiting principle. If, as the panel held, the treaties include an implied promise "that there would be fish sufficient to sustain" the Tribes by providing a "moderate living," Pet. App. 92, 94, nothing precludes the Tribes from pursuing any and all other potentially offending conduct.

As indicated in a 1999 report drafted with input from the Tribes, a host of other human-caused activities similarly exert downward pressure on salmon populations. Carol J. Smith, *Salmon Habitat Limiting Factors in Washington State.*[16] Dikes, levees, revetments, and roads disconnect floodplain main channels and impede lateral movement of flood flows, both of which are important components of salmon habitat. *Id.* at 118. Removal of riparian vegetation decreases shade and increases bank instability, which causes erosion. *Id.* at 127. Logging, development and agriculture may cause detrimental changes to the quantity and quality of sedimentation in which salmon deposit their eggs. *Id.* at 174. Large woody debris is an important component of stream habitat, *id.* at 127, and while logging is the primary

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[16] *Available at* http://tinyurl.com/y9glzj22. Tribal contributions to the report were made by Jennifer Cutler and Ron McFarlane of the Northwest Indian Fisheries Commission (NWIFC) (*see id.* at 2); *see also* CA9 ER 1127 (McHenry, 157:11-18).

human activity that decreases its presence, any development that requires clearing near streams may have similar impacts. Any human activity that decreases the amount of forest cover, wetlands, and riparian vegetation or increases the amount of impervious surfaces, sedimentation, and roads (i.e., all development) may change the frequency and magnitude of flood flows, which play a key role in stream channel structure and function. *Id.* at 174. Agricultural land uses which require dikes and tide gates and any land use that requires near-shore filling and dredging or construction of overwater structures (*e.g.*, docks and piers) may harm estuarine and near-shore habitat. *Id.* at 192. And "industrial, urban, and agricultural activities" may result in alterations of the amount of dissolved oxygen and water temperatures, which can be "detrimental to salmonids or to the food web that supports salmonids." *Id.*

While the parties before this Court speak in terms of millions and low billions of dollars, it stands to reason that left unaltered, the cumulative effect of the Ninth Circuit's opinion could leave stakeholders talking in terms of tens, if not hundreds, of billions of dollars.

C. The lower courts' overbroad injunction contravenes settled law and threatens counties and cities with wastefully diverting expenses

The jarring figures we reference are, at least in part, a consequence of the overly broad injunction issued by the district court and approved by the Ninth

Circuit. It is axiomatic that courts are precluded from issuing injunctions that go beyond that which is necessary to correct the specific violation. *See Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation"); *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982) ("only the specific conditions that violate the Constitution may be remedied, and the remedy may be only so much as is required to correct the specific violation"), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see also United States v. Washington*, 520 F.2d 676, 689 (9th Cir. 1975) ("We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast").

Here, the lower courts here did precisely that by holding the State accountable for not only all human activities that have contributed to diminished fish harvests over time (regardless of the degree to which the State's actions have contributed), but for activity that has had *no impact* on the salmon population *at all*. As Judge O'Scannlain explained it, the import of the panel opinion is the State must repair all culverts in the Case area "without regard to whether replacement of a particular culvert actually will increase the available salmon habitat." Pet. App. 37a. That is because nearly 90% of implicated state barrier culverts in the Case Area are upstream or downstream of other non-State barriers. J.A. 327a-328a. Given the (over-)breadth of the injunctive relief,

there is every reason to believe the same ill-fated logic would prevail if the counties and cities become the next target. The potential result being wasteful re-allocation of resources and concomitant deprivation of the communal benefits that come along with the activities from which funds will be diverted (*e.g.*, docks, dams, irrigation).

D. Without clear guidance on its scope, the Ninth Circuit's opinion could chill public works projects and hamper developments beneficial to citizens of the Case Area Counties and Cities

To this point, we've discussed only the impact of the Ninth Circuit's decision on pre-existing projects. Make no mistake, the prospective impact is just as, if not more, significant. Even in the absence of a lawsuit, the mere threat of litigation will have an immediate impact on political subdivisions. Without clear guidance, counties and cities considering any project—public or private—will not know how to give due attention to tribal treaties in their decision making. The result: even the most remote threat to salmon will likely chill future developments. For a county or city to proceed otherwise could prove an unpalatably costly endeavor as a later determination that the project adversely impacts Tribes' "moderate living" could ring up considerable financial costs.

This is just one example of the mischief that will ensue from the Ninth Circuit's opinion. Consider another. When asked to permit a private development, Case Area counties may be inclined to approve it subject to mitigation conditions on wetland

development under the Washington Growth Management Act and the county's critical area ordinances. Such restrictions are cabined by this Court's decisions in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). But assuming the county can demonstrate "a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use," the county is within its right to set such conditions. *Koontz*, 570 U.S. 599.

In the wake of the Ninth Circuit's decision though, the county may also have to condition permit approval on Tribal confirmation that the proposed mitigation adequately protects their treaty right to take fish. However, it is unclear whether the Tribe's approval will be similarly subject to the "nexus" and "rough proportionality" test. Were the county to then add the tribal conditions to the permit, it might violate the unconstitutional conditions doctrine under *Koontz* and *Nollan/Dolan*. Alternatively, if the county were to grant the permit without such conditions, it might violate the treaty right to take fish. In other words, the potential import of the Ninth Circuit's decision threatens political subdivisions with the prospect of being liable to someone no matter which path they pursue. The signatories to the Treaty certainly could not have intended such an outcome, nor is it good policy to place the counties and cities in such an untenable position.

II. Washington's Counties And Cities Face An Even Greater Threat Than The State

The State's counties and cities have justifiably greater concerns than the State of Washington itself. In concurring in the denial of en banc rehearing, two panel members claimed they were "sure" their opinion had "not opened the floodgates to a host of future suits" in part because the Eleventh Amendment would bar "further suit against Washington State ... brought by the Tribes." Pet. App. 11a. As they explained, future suits could only proceed if the Tribes first receive approval from the federal government. *Id.*

As an initial matter, the panel's level of confidence is odd considering it could not even anticipate "what the hypothesized future suits would be." *Id.* Second, the answer is readily apparent: suits against counties and cities. That is because, unlike the State, "cities and counties do not enjoy Eleventh Amendment immunity." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *see also N. Ins. Co. of New York v. Chatham Cty.*, 547 U.S. 189, 193 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties").

The panel's assurance that it "was no easy thing for the Tribes to persuade the United States to institute proceedings against the state of Washington," Pet. App. 11a, merely reinforces the deep concerns of the counties and cities, since the Tribes are able to bring suits against them without the participation of the United States. If it's difficult to persuade the United States to participate in a suit against the state

of Washington, the obvious move for the Tribes is a series of lawsuits against the state's political subdivisions. Similarly, the counties and cities are in no way reassured by the panel's reassurance that "further suit against Washington State seeking enforcement of the Treaties" cannot be brought by "non-Indians who would benefit from an increase in harvestable salmon" or by "environmental groups." *Id.* While it is true that non-Indians and environmental groups cannot sue to enforce tribal treaty rights, they are likely to import the fish supply guarantee created by the Ninth Circuit opinion into their own lawsuits brought on other grounds, *e.g.*, in litigation challenging development approvals and water allocation decisions based on other theories—including those challenging existing, privately held water rights—by arguing that those decisions must take into consideration that newly understood treaty-based right.

And even where Eleventh Amendment immunity applies, the *Ex Parte Young* doctrine allows a suit—technically brought against an individual—so long as the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (1997). *Ex Parte Young* still applies even if there are severe "fiscal consequences" to complying with an injunction, as in this case. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974).

Accordingly, the majority's assurances that the Eleventh Amendment cabins its opinion is cold com-

fort to cities and counties who cannot avail themselves of that shield. *See, e.g., Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, No. 08-cv-5562, 2008 WL 4681630 (W.D. Wash. Oct. 21, 2008) (suit by tribe against Washington county concerning tax assessment); *Makah Indian Tribe v. Clallam Cty.*, 440 P.2d 442, 443 (Wash. 1968) (same concerning imposition of ad valorem tax on tribe members' personal property). They are thus subject to the prospect of spending billions of dollars collectively when demanded by the Tribes (if a similar injunction issues), not to mention the threat of an unilateral tribal de facto veto power on any future project that might possibly affect the supply of salmon.

Whatever solace the panel took in knowing the federal government would operate as a check against the Tribes, it is of no refuge—and certainly provides no backstop—for Washington State's counties and cities. Simply saying, as the panel did, that the opinion is narrow does not make it so. The decision's consequences threaten to reach far beyond the facts of this particular case and deep into the pockets of hundreds of political subdivisions.

CONCLUSION

For these reasons, WSAC and AWC respectfully request that this Court reverse the judgment of the Ninth Circuit opinion.

Respectfully submitted,

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